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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 736

EVANSTON-NORTH SHORE BOARD OF REALTORS,
an Illinois not-for-profit corporation,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The petitioner, Evanston-North Shore Board of Realtors, prays that a writ of certiorari be issued to review the judgment of the United States Court of Claims entered on July 12, 1963, rehearing of which was denied by the Court of Claims on October 11, 1963.

OPINION BELOW

The opinion of the Court of Claims, printed in Appendix B hereto, is reported at 320 F.2d 375. Also reprinted in Appendix B, but not reported, are the findings of fact and conclusions of law of the Court of Claims.

JURISDICTION

The opinion and judgment of the Court of Claims was entered on July 12, 1963. R. 27. A timely motion for rehearing was filed in that Court on August 14, 1963, R. 57, and an order denying rehearing was entered by the Court on October 11, 1963. R. 79.

This Court has jurisdiction to review the judgment of the Court of Claims by writ of certiorari under the provisions of 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the legal test of exemption from federal income taxation for an organization set forth in Section 501(c)(6) of the Internal Revenue Code of 1954 is the *purpose* for which the organization exists and carries on its activities or whether the legal test is that to be exempt all of such organization's substantial activities (measured in terms of cash flow and number of employees involved) must themselves be *activities* warranting independent exemption regardless of the purpose for which the organization exists or why the activities in issue are carried on.

2. Whether an admitted real estate board loses the exemption from federal income taxation expressly granted by Section 501(c)(6) of the Internal Revenue Code of 1954 because, as part of its entire program of activities directed to the improvement of business conditions in the business of real estate brokerage, it adopts rules requiring its members to exchange information concerning listed properties and to cooperate with other members in the sale of property and undertakes certain mechanical functions in connection with the exchange of information.

STATUTES AND REGULATIONS INVOLVED

This case involves Section 501(c)(6) of the Internal Revenue Code of 1954, 26 U.S.C. § 501(c)(6), and Section 1.501(c)(6)-1 of the Treasury Regulations on Income Tax (1954 Code). The pertinent parts of this statute and Regulation are set forth below; their full text is reproduced in Appendix A hereto.

> Sec. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.
>
> (a) EXEMPTION FROM TAXATION.—An organization described in subsection (c) or (d) . . . shall be exempt from taxation under this subtitle unless such exemption is denied under section 502, 503, or 504.
>
> . . . . .
>
> (c)(6) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.
>
> Regs. Sec. 1.501(c)(6)-1 BUSINESS LEAGUES CHAMBERS OF COMMERCE, REAL ESTATE BOARDS, AND BOARDS OF TRADE.
>
> A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league. . . .

STATEMENT OF THE CASE

Petitioner is an admitted real estate board of the type expressly exempted from federal income taxation by Section 501(c)(6) of the Internal Revenue Code of 1954. Tr., Willi; pp. 13, 17; R. 40, Finding No. 8. Petitioning Board had twice been ruled exempt from federal income taxes under the predecessors of Section 501(c)(6). R. 41, Findings No. 11 and 12. In 1960, however, the Commissioner of Internal Revenue revoked the prior exemption rulings regarding petitioning Board and subsequently assessed and collected income taxes against petitioning Board for the year ended June 30, 1959. R. 43-46, Findings No. 15, 16 and 17. Petitioner then brought suit in the United States Court of Claims for refund of these taxes on the grounds that they had been erroneously and illegally assessed. R. 46, Finding No. 19. The Court of Claims, which had jurisdiction of such a suit under 28 U.S.C. § 1346(a)(1) and 28 U.S.C. 1491, dismissed petitioner's suit. R. 27 *et seq.*

The grounds on which the Commissioner of Internal Revenue revoked the exemption rulings governing petitioning Board and the grounds on which the Court of Claims denied petitioning Board relief was its operation of a "multiple listing service." R. 44-45, Finding No. 16; R. 27 *et seq.* The record shows that what is referred to as petitioner's multiple listing service is, in fact, several Board rules adopted over the years which require:

1. That members of petitioning Board cooperate with other members of the Board in the sale of property exclusively listed with them. PX 3; Tr., Orth, pp. 60-61.

2. That members of petitioning Board forward to the Board within forty-eight hours of receiving a listing certain prescribed information concerning the listed property. PX 9, pp. 82-87; Tr., Orth, p. 65; McGuire, pp. 222-225.

3. That the Board receive and transmit this in-

formation to a printer who reproduces and distributes it to all Board members. PX 22; Tr., Orth, pp. 79-81.

4. That Board members arbitrate all commission disputes so that buyers and sellers of property are not brought into such a dispute between brokers. PX 9, pp. 78-80; Tr., Orth, pp. 77-78; Rumsfeld, pp. 171-172.

5. That rules of brokerage practice which provide agreed standards of business practice, including the division of commission in cooperative sales, be followed by all members. PX 9, pp. 96-100; Tr., Rumsfeld, pp. 169-171.

Most of these rules were adopted before 1953, the year in which the Court of Claims found petitioner had adopted a multiple listing system. The only rule adopted in 1953 was the rule, PX 24, requiring Board members to forward information concerning listed properties to the Board within forty-eight hours of receiving the listing. The other rules governing divisions of commissions and establishing procedures to be followed in connection with cooperative selling antedated the information exchange and were necessary to make cooperative selling practical whether or not petitioner's members exchanged information through the Board concerning their listings.

The foregoing so-called multiple listing rules, along with a number of other activities set forth in the record, are all part of an overall program of petitioning Board designed to improve, elevate and professionalize the business of real estate brokerage in the North Shore suburbs of Chicago. R. 39, 40, and 46 through 48; Findings No. 4, 9, 10, and 21 through 27. Petitioning Board was not formed nor does it exist to operate a multiple listing service or to render particular services to its members. R. 38-39; Finding No. 2. It exists and undertakes all its activities for the same exempt purposes for which it was organized.

The Revenue Service in revoking petitioner's exemption ruling and in resisting petitioner's suit for refund con-

tended that the multiple listing service was a business of a kind ordinarily carried on for profit and that it rendered particular services to petitioner's members. Further, it argued, that the multiple listing service was petitioner's primary activity because of the cash flow on petitioner's books resulting from the fees charged to defray the cost of operation of the multiple listing service and the time of petitioner's clerical employees spent in connection with it. According to the Revenue Service, the purpose for which an association is organized and carries on its activities is immaterial so long as any important activity of the association is not itself independently entitled to exemption.

Petitioner controverted the factual contentions made by the Revenue Service and also argued that the Revenue Service position did not represent the correct legal test of exemption under Section 501(c)(6). Petitioner argued before the Court of Claims that an organization named in Section 501(c)(6) is exempt so long as it is organized as a not-for-profit entity, has an overall exempt purpose and directs its activities to that exempt purpose even though some of its activities, when considered separately from the program of the organization as a whole, may be activities of a kind ordinarily carried on for profit or result in performance of particular services for the organization's members.

The Court of Claims in its opinion adopted the Revenue Service's position and dismissed petitioner's claim. It considered wholly irrelevant and made no findings whatsoever concerning the extensive proof offered by the petitioning Board concerning the history and purposes of its organization and activities and how the various rules which the Court of Claims lumped together in its concept of multiple listing assisted petitioner in achieving its purposes. Petitioner's proof showed that it was formed in 1919 for the specific purpose of improving certain designated conditions which existed in the real estate business at that time. These

were a lack on the part of real estate brokers and salesmen of the education and training necessary to carry on their businesses in an adequate and competent way, Tr., Cyrus, pp. 26-27; net listing practices, *i.e.* purchases by brokers of property from their clients at a low price for resale by the broker at a higher price, Tr., Cyrus, p. 27; a general lack of ethical practice and fair dealing on the part of many in the industry, Tr., Cyrus, pp. 28-29; distrust by one broker of another with a resultant lack of cooperation among them in the sale of properties, Tr., Cyrus, p. 27; and stealing of prospects and listings by unscrupulous brokers with the result that disputes among owners and brokers as to who had made a sale and who was entitled to commission were common, Tr., Cyrus, pp. 27-29. Also, as a result of these conditions owners frequently became legally obligated to pay more than one commission on a single sale, Tr., Cyrus, p. 29. The cumulative effect of these conditions was that owners and purchasers were reluctant to buy and sell properties through real estate brokers and brokers' services were, therefore, not sought in connection with many sales. Tr., Cyrus, pp. 28-29.

Petitioner's proof also showed that petitioner's various programs and activities bore a direct relationship to improvement of these undesirable conditions. For example, petitioner's member selection and educational program helped to improve the training, competence and standing of real estate brokers. Similarly its adoption of a Code of Ethics and procedures for enforcing this Code prevented unfair dealing, and its arbitration procedures prevented its members from claiming more than one commission against a seller of property regardless of the number of brokers involved. Among other things, the record showed that the standards of fair dealing which the petitioner thus imposed upon its members exceeded those required of them by the law of the State of Illinois. Tr., Rumsfeld, p. 182.

The various rules which the Court of Claims treated in a lump as petitioner's "multiple listing system" likewise

bore a direct connection to improvement of the conditions which petitioner was created to improve. The required exchange of information, for example, prevented the secret listing practices which previously had led to unfair dealing and disputes with owners over commissions. And the rules of brokerage practice requiring petitioner's members to permit other members to cooperate with them in the sale of properties and establishing procedures to be followed in event of cooperation made such cooperation possible and practical whereas previously cooperation had been impossible and productive of endless controversy which redounded to the detriment of the business of real estate brokerage as a whole.

And, finally, the evidence showed that as a result of petitioner's activities both buyer and seller were separately represented in real estate transactions by brokers serving their interest in more than 50% of the transactions involving residential property which were consummated in petitioner's area. Tr., Orth, pp. 69, 71, 98-100; Pearson, p. 161; Rumsfeld, p. 194. And that, as a result of petitioner's program, today real estate brokers participate in over 90% of the sales of residential property in plaintiff's area compared to a very insubstantial percentage prior to petitioner's activities. Tr., McGuire, pp. 241-242, 259.

It is petitioner's contention that the Court of Claims erred in refusing to consider this proof of petitioner's exempt purpose and the relationship of its activities to this purpose and that the Court of Claims was led into this error by its erroneous interpretation of the legal test for exemption from federal income tax which has been established by Congress in Section 501(c)(6) of the Internal Revenue Code and is reflected in the applicable Treasury Regulation.

The correct legal test is that so long as an organization is organized and continues to exist for the purpose of improving industry conditions it is entitled to exemption even though one or more of its individual activities may be

deemed to be non-exempt when considered separately from the program of the organization as a whole. This is the interpretation of Section 501(c)(6) and the applicable Treasury Regulation which has been adopted by a majority of the federal courts. See pp. 16 through 19; *infra*.

The Court of Claims, however, held in the opinion below that whenever an organization engages in an activity which is not itself exempt and that activity accounts for a substantial part of the expenses and receipts of the organization and the time of its personnel, the organization loses its exemption regardless of the continuing exempt purpose for which the organization itself exists and the exempt purposes which had led to its engagement in the non-exempt activity.[1]

The legal issue thus posed by this case raises an important question with respect to the administration of the internal revenue laws which should be resolved by this Court for the reasons shown in the succeeding portions of this petition.

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[1] The practical significance of this erroneous interpretation by the Court of Claims becomes apparent when the court's opinion is examined. Although these were the subjects of all of petitioner's evidence, there is no reference whatsoever in the opinion to the reasons why the petitioning Board now exists, what its reasons were and what it intended to accomplish by entering into its various programs, including multiple listing and what the history and reasons were for the various board rules which the court lumped together under the general compendium "multiple listing". The only discussion in the opinion is upon two limited, abstract, and, we contend, largely irrelevant issues: namely, whether "a multiple listing system" (not necessarily the petitioner's program) is operated primarily for the benefit of individual Realtors and, second, whether a substantial portion of the time of petitioner's paid employees (not petitioner's members it may be observed) and a significant portion of petitioner's receipts and disbursements, are attributable to multiple listing. Moreover, even when this discussion of receipts, expenditures and employees' time was completed, the Court of Claims did not conclude therefrom that petitioner exists for the purpose of carrying on the multiple listing service or for the purpose of rendering particular services to its members, but only that the "relative contribution to plaintiff's receipts and expenditures of its listing service, and the amount of personnel which the service requires are sufficiently substantial that the listing service cannot be regarded as an incidental activity of the Board."

REASONS FOR GRANTING THE WRIT

I.

The legal test of exemption applied by the Court of Claims under Section 501(c)(6) of the Internal Revenue Code of 1954 presents an important question of interpretation of the exemption provisions of the internal revenue laws which has not been, but should be, settled by this Court because of the differing interpretation of the test of exemption under this and related sections of the revenue laws espoused by the Internal Revenue Service and that applied by many federal courts.

Section 501 of the Internal Revenue Code of 1954, 26 U.S.C. § 501, grants exemption from federal income taxation to a number of organizations, associations and corporations. Some of these organizations are exempted without any restriction, but others are exempted only when they meet certain additional qualifications. Three classes of organizations covered by Section 501(c) share some common or close to common additional qualifications for exemption:

> Section 501(c)(3)—Those ". . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . ."
>
> Section 501(c)(6)—"Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."
>
> Section 501(c)(7)—"Clubs organized and operated exclusively for pleasure, recreation, and other non-

profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder."

All of the above organizations, to be exempt, must meet the common requirements that they be organized for a specific exempt purpose[2] and that no part of their net earnings inure to the benefit of any private individual.

The Internal Revenue Service, in a widespread attempt to restrict the express exemption given these various organizations by Congress, has attempted to add an additional requirement for exemption, namely, that to retain their exemption the organizations may not engage in any "substantial" activity which is not itself entitled to exemption independently of the organization carrying it on. The Revenue Service has then established the measure of what is and what is not a substantial activity by the accounting devices of the cash flow resulting from a particular activity and the amount of time of the organization's employees devoted to the activity. If an otherwise exempt organization undertakes a substantial (in these accounting terms) activity which is not itself independently exempt, the Revenue Service contends that the organization loses its express exemption regardless of the organization's over-all exempt purpose and regardless of how that particular activity implements the organization's exempt purpose. This position of the Internal Revenue Service is well illustrated by Rev. Rul. 59-234, 1959-2 C.B. 149, regarding so-called multiple

[2] In the case of 501(c)(6) the exempt purpose of promoting a common business interest is set forth not in the statute but in the applicable Treasury Regulation, § 1.501(c)(6)-1, which has remained unchanged since 1929 and has the force of statutory law. *Automotive Electric Ass'n* v. *Commissioner*, 168 F.2d 366, 367 (C.A. 6); *Apartment Operations Ass'n* v. *Commissioner*, 136 F.2d 435, 436 (C.A. 9).

listing as carried on by real estate boards,[3] which Revenue Ruling is reprinted in Appendix C hereto.

Within the last two years the lower federal courts have on three occasions been presented with the Internal Revenue Service's gratuitously added requirement for exemption under these comparable provisions of Section 501(c) and have rejected it uniformly. In *Passaic United Hebrew Burial Ass'n* v. *United States*, 216 F. Supp. 560, the District Court for New Jersey rejected the Revenue Service's argument that an organization which conducted orthodox Jewish burials for a fee for those who could pay (roughly 38 per cent being charged a fee that resulted in a "profit") and free for those who could not (roughly 2½ per cent of all its burials) had lost its exempt status under Section 501(c)(3) because it was engaged in a commercial undertaking and burial enterprise. In *American Institute of Interior Designers* v. *United States*, 208 F. Supp. 201, the District Court for the Northern District of California rejected the Revenue Service's argument that an organization of interior decorators had lost its exempt status under Section 501(c)(6) because it conducted a trade show which accounted for from 96 to 97 per cent of its income and from 73 to 75 per cent of its expenses. In *Fort Worth Club of Fort Worth, Texas* v. *United States*, 218 F. Supp. 431, the District Court for the Northern District of Texas rejected the Revenue Service's argument that a downtown men's club had lost its exemption under Section 501(c)(7)

[3] There are substantial differences between the "multiple listing system" described in Rev. Rul. 59-234 and petitioner's rules relating to exchange of information regarding listed properties and co-operation in the sale of them. In fact, the record before the Court of Claims showed there was no one form of "multiple listing system." DX 8, p. 9.

because it received substantial income from the rental of commercial space in its clubhouse building.

In spite of these decisions—two of which it has not seen fit to appeal[4]—the Revenue Service has not lessened its attack on the exempt status of any organization engaging in an activity which is not itself exempt; it continues to apply its own standards as to what activities can and what activities cannot be carried on by an exempt organization without the loss of its exemption. With the Revenue Service applying one legal standard of exemption under Section 501(c)(6) and the lower federal courts applying another, this Court—which has never decided a case under Section 501(c)(6) or the corresponding provisions in prior acts—should resolve the confusion resulting from these conflicting interpretations of an important question of federal law. Such a resolution by this Court will also be of great value in determining exemption under the similarly worded provisions of Sections 501(c)(3) and 501(c)(7).

The far-reaching practical significance of the legal issues presented by this appeal is demonstrated by the fact that in the year ended June 30, 1962, the district offices of the Revenue Service issued 4,970 determination letters involving exempt organizations and closed another 1,359 such inquiries received from exempt organizations without issuing such a formal letter. Commissioner of Internal Revenue, Annual Report 1962, p. 11. Moreover, reference to the United States Department of Commerce, Directory of National Associations of Businessmen (1961), pages 1 and 4, reveals that in 1961 there were 13,000 national and local trade associations, 5,000 local chambers of commerce and 1,300

[4] According to the Prentice-Hall Federal Tax Service Citator and the Commerce Clearing House, Standard Federal Tax Reporter, an appeal has been taken by the government only in *Fort Worth Club of Fort Worth, Texas* v. *United States*.

local real estate boards in the United States. According to the record before the Court of Claims in this case, some 573 of these real estate boards have some form of board-organized exchange of information which is commonly referred to as multiple listing. Tr., Spatz, p. 301. It is of critical importance in the administration of the income tax laws as applied to this vast number of associations to have a clear cut definition by this Court of the restrictions, if any, intended to be imposed upon their activities by the language of Section 501(c)(6) of the Internal Revenue Code. Many of these associations conduct various activities directed to the improvement of business conditions in their area of operations, which activities are not themselves exempt. The tax exempt status of all of these organizations is cast in doubt by the Revenue Service's interpretation of the requirements for exemption. This is particularly true of the 573 real estate boards with some form of multiple listing as part of their programs, each of which is presently in the posture of seeking a determination contrary to that made by the Court of Claims as to the Evanston-North Shore Board by bringing an action for refund of federal income taxes assessed in some other federal court.

II.

The legal test of exemption adopted by the Court of Claims as applicable under Section 501(c)(6) of the Internal Revenue Code of 1954 resolves an important question of interpretation of the exemption provisions of the internal revenue laws in such a manner as to conflict in principle with the decision of this Court in *Trinidad* v. *Sagrada Orden.*, 263 U.S. 578.

In applying a legal test of exemption which disregards petitioning Board's over-all purpose and concentrates on whether one of its many activities is "an activity warranting

exemption under the statute," R. 30, the Court of Claims applied a legal test which conflicts with that set down in the only decision of this Court interpreting any of the provisions of Section 501 or the corresponding provisions in prior revenue acts.

In *Trinidad* v. *Sagrada Orden*., 263 U. S. 578, this Court affirmed the decision of the Supreme Court of the Philippine Islands sustaining the exemption of a corporation sole organized and operated for religious, benevolent, scientific and educational purposes and which was engaged in missionary work in the Philippines and Asia. The corporation claimed exemption under the provisions of the Revenue Act of 1913 which are comparable to Section 501(c)(3) of the Internal Revenue Code of 1954.[5] In addition to its religious activities, the corporation held stock in private corporations from which it received dividends, loaned money on which it received interest, sold wines, chocolates and other articles for a profit, and owned huge tracts of land which it rented to others for non-exempt uses. The income from these commercial activities totaled somewhat more than the equivalent of $125,000 a year in American currency. This income was devoted to carrying on the corporation's religious, charitable and educational activities. The Collector of Internal Revenue urged in that case the same activities test of exemption applied by the Court of Claims in the decision below, contending that the corporation was not "operated exclusively" for exempt purposes because it is "operated also for business and commercial purposes in that it uses its properties to produce income, and trades in wines, chocolates and other articles."

[5] Sec. II(G)(a) of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166. Sec. II(G)(a) exempted any corporation "organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private shareholder or individual."

This Court, by Mr. Justice Van Devanter, stated that the Collector's legal theory ignored the fact that the income from the properties was devoted to religious and educational purposes and that the limited trading carried on was incidental to these purposes. This Court held as to the income produced from dividends, rental and interest that: "In using the properties to produce the income, it therefore is adhering to and advancing those purposes, and not stepping aside from them or engaging in a business pursuit."

In the *Trinidad* decision, this Court rejected in principle the legal standard that to be exempt all of an organization's substantial activities must also be exempt and ruled instead that exemption depends on whether an organization has an over-all exempt purpose and all of its activities (whether or not exempt in themselves) are directed to that over-all purpose. In its decision holding petitioner not entitled to exemption, the Court of Claims applied a standard of exemption in conflict with the decision of this Court in the *Trinidad* case.

III.

The decision of the Court of Claims in this case creates a conflict among the circuits on the question of the legal test of exemption under Section 501(c)(6) in that the test applied by the Court of Claims is directly contrary to the test of exemption enunciated and applied by the Courts of Appeals for the Fifth, Seventh and Eighth Circuits.

In requiring that all of an exempt organization's activities which create a substantial cash flow or require considerable clerical work must also warrant exemption, the Court of Claims has established a legal standard of exemption in direct conflict to that applied by the Courts of Appeals for the Fifth Circuit in *Texas Mobile Home Ass'n* v.

Commissioner, — F.2d —, 63-2 USTC ¶ 9831, for the Seventh Circuit in *Commissioner* v. *Chicago Graphic Arts Federation*, 128 F.2d 424, and for the Eighth Circuit in *Crooks* v. *Kansas City Hay Dealers' Ass'n*, 37 F.2d 83. In each of these decisions, as well as in a number of District Court decisions,[6] the courts have upheld the exempt status of a business league in spite of the fact that it was engaged in substantial activities (as those terms were used by the Court of Claims) that did not themselves warrant exemption and they have done so because, notwithstanding the fact that the activities themselves were not exempt, they were carried on in furtherance of or incidental and subordinate to the business league's over-all exempt purpose.

In *Texas Mobile Home Ass'n* v. *Commissioner*, — F.2d —, 63-2 USTC ¶ 9831, the Court of Appeals for the Fifth Circuit reversed a decision of the Tax Court that a trade association of mobile home or house trailer dealers had lost its exempt status under Section 501(c)(6) by conducting a trade show from which it received substantial profits, 79 per cent of its net income in 1956 and 40 per cent in 1957. The organization had contended before the Tax Court and before the Court of Appeals that any profits received or services rendered its members through the conduct of the trade show "were incidental to its primary purpose of improving business conditions in the mobile home industry." The Court of Appeals stated that in refusing to hold the organization exempt ". . . the purpose and effect of the Congressional act was entirely overlooked, indeed

[6] For example, *American Fishermen's Tuna Boat Ass'n* v. *Rogan*, 51 F. Supp. 933 (S.D. Cal.); *National Leather & Shoe Finders Ass'n* v. *Commissioner*, 9 T.C. 121; *Milwaukee Ass'n of Commerce* v. *United States*, 72 F. Supp. 310 (E.D. Wis.); *Little Rock Grain Exchange* v. *Thompson*, 93 F. Supp. 571 (E.D. Ark.); *American Institute of Interior Designers* v. *United States*, 208 F. Supp. 201 (N.D. Cal.).

disregarded." The Court then accused the Tax Court of having its "gaze so foreshortened by the view of the publican and the tax gatherer that it tithed mint, anise and cumin, overlooking the weightier things of applicable law . . . ."

In *Commissioner* v. *Chicago Graphic Arts Federation*, 128 F.2d 424, the Court of Appeals for the Seventh Circuit affirmed a decision of the Tax Court that a trade association of printing plant owners and operators had not lost its exempt status by engaging in the operation of a credit information bureau, an employment service, handling sales tax refund claims for the industry, and conducting a co-operative waste paper disposal service—all activities not exempt in themselves. The organization's income from these other activities accounted for 40 per cent and 34 per cent of its total income during the years in suit.[7] The Revenue Service contended that because the organization engaged in these substantial non-exempt activities it was not entitled to exemption. The Court of Appeals rejected this standard and stated the test of exemption to be as follows (p. 426):

> Where the business league has proper purposes without prohibited ones, then, if it operates in conformity to it, it is entitled to exemption. To come within the exemption, however, its activities must be directed to the improvement of business conditions or to the promotion of the general objects of one or more lines of business as distinguished from the performance of particular services for individual persons, but if the services are only incidental or subordinate to the main or principal

[7] The Court of Claims sou[illegible] to distinguish this case on the grounds, *inter alia*, ". . . the relative importance of the nonexempt activities had steadily declined to 17% in 1939. . . ." The suit, however, involved the years 1936 and 1937 for which the figures given above are applicable.

> purposes required by statute, then exemption cannot be denied on the ground that the purpose is to engage in a regular business of a kind ordinarily carried on for profit, . . .

In *Crooks v. Kansas City Hay Dealers' Ass'n*, 37 F.2d 83, the Court of Appeals for the Eighth Circuit affirmed a decision of the District Court that an association of hay and straw brokers was entitled to exemption in spite of considerable non-exempt activities which included weighing, plugging, watching and inspecting cars of hay, all for a fee. The Revenue Service contended that because of its undertaking these activities the association was organized for profit. The Court of Appeals held that these activities and the proceeds from them were merely incidental to the over-all purposes of the association and the association retained its exempt status.

The decision of the Court of Claims in the case at bar establishes a legal test for exemption under Section 501(c)(6) which is in direct conflict with these Court of Appeals decisions, and this Court should, accordingly, review the decision of the Court of Claims to establish the correct legal standard.

IV.

The legal standard for exemption adopted by the Court of Claims in the decision below is directly contrary to the clear Congressional intent on the requirements for exemption under Section 501(c)(6).

Real estate boards as such were not specifically included in the list of organizations exempted by Congress from federal income taxation until the adoption of the Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 103. Congress was prompted to add real estate boards to the expressly ex-

empted organizations, in spite of the fact that they could well be considered "business leagues", by the fact that during the 1920's the Internal Revenue Service had mounted a two-fold attack on their exempt status. The Revenue Service argued, on the one hand, that since the exemption provision of the statute referred only to business leagues, chambers of commerce and boards of trade, under the rule of *expressio unius* real estate boards had not been granted exemption. On the other hand, the Revenue Service contended that since real estate boards were regularly engaged in a number of activities, such as appraising property, furnishing information about available property in a particular area, and selling meals to their members, which were not activities themselves entitled to exemption, they were not entitled to exemption even if they were to be considered business leagues. This latter argument is precisely the one now being urged against petitioner. The hearings held before the House Ways and Means Committee, House Hearings, Revenue Revision, 1927-1928, pp. 202, 233, 235-238, show that the exempt status of real estate boards in Philadelphia, Rochester, Baltimore, Louisville and elsewhere was being attacked under this activities theory. Nathan MacChesney, Esq., who appeared before the Ways and Means Committee on behalf of the National Association of Real Estate Boards to urge the addition of real estate boards to the list of exempt organizations, stated that the Treasury Department "has attempted to collect from the Philadelphia real-estate board a tax against it as a profit-making institution." He then described one of the Philadelphia board's activities which the Treasury had attacked: a means whereby people could obtain information about available property through maps and pictures. After referring to a then recent decision of this Court, which while

not mentioned by name must have been *Trinidad* v. *Sagrada Orden.*, 263 U.S. 578, Mr. MacChesney concluded "it should be fairly apparent that the real-estate boards of the country were not organized for the purpose of rendering a business service for profit."

In view of this testimony before the Ways and Means Committee, it is quite clear that by adding real estate boards to the list of exempt organizations contained in Section 501(c)(6) Congress intended not only to exempt from tax those boards all of whose activities were themselves entitled to exemption, but also boards a part of whose activities did not independently qualify for exemption. If there could be any doubt on this question, it is put to rest by the amendment of the applicable Treasury Regulation which was adopted following the amendment of the statute. Because the Internal Revenue Code has been revised several times since the Regulation was amended, this Regulation has the implied approval of Congress and the force of statutory law. *Automotive Electric Ass'n* v. *Commissioner*, 168 F.2d 366, 367 (C.A. 6). Prior to the amendment adding real estate boards to the list of exempt organizations contained in the predecessor of Section 501(c)(6) of the statute, the Treasury Regulation applicable to business leagues, and hence to real estate boards, added to the Congressional qualifications for exemption the additional requirement that a business league be "... an association of persons having some common business interest, *which limits its activities to work for such common interest and does not engage* in a regular business of a kind ordinarily carried on for profit." (Emphasis supplied.)

Subsequent to the amendment of the statute and in light of the decision of this Court in *Trinidad* v. *Sagrada Orden.*, the Treasury Regulation was amended to define a business

league as ". . . an association of persons having some common business interest, *the purpose of which is to promote such common interest and not to engage* in a regular business of a kind ordinarily carried on for profit." (Emphasis supplied.) This change in the definition contained in the Regulation from "limits its activities" to "the purpose of which" indicates a clear shift from the legal test of exemption espoused by the Revenue Service and applied by the Court of Claims to the test of exemption urged by petitioner in this case.[8]

The Court of Claims' decision, in ignoring the impact on the applicable standard of exemption of the 1928 amendment to the exemption provisions of the statute and the subsequent change in the applicable Treasury Regulation, has established a standard of exemption that is directly contrary to the standard set down by Congress as well as that applied by other federal courts.

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[8] This change from "activities" to "purpose" is carried out throughout the revised Treasury Regulation:

Reg. 69, 1926, Art. 518
A business league is an association of persons having some common business interest, *which limits its activities to work* for such common interest and *does not* engage in a regular business of a kind ordinarily carried on for profit.

. . . .

If it engages in a regular business of a kind ordinarily carried on for profit, the fact that the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not ground for exemption. (Emphasis supplied.)

. . . .

Reg. 74, 1929, Art. 528
A business league is an association of persons having some common business interest, *the purpose of which is to promote* such common interest and *not to* engage in a regular business of a kind ordinarily carried on for profit. . . . Thus its activities should be *directed to* the improvement of business conditions or to the promotion of the general objects of one or more lines of business as distinguished from the performance of particular services for individual persons. *An organization whose purpose is to engage* in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league. (Emphasis supplied.)

. . . .

CONCLUSION

For the reasons set out above, it is respectfully requested that this petition for a writ of certiorari be granted.

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